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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-643

DOUGLAS FREEMAN ROSS
MILLARD FRANKLIN ASHLEY
LONNIE ELLIS JOHNSON,

PETITIONERS,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Douglas Freeman Ross, Millard Franklin Ashley and Lonnie Ellis Johnson, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 14, 1971, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated October 14, 1971, has not been reported to date. This opinion appears in the Appendix hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals is dated October 14, 1971, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Government can present evidence at the trial pertaining to an object of the conspiracy completely different from that specifically alleged in the Bill of Indictment?

2. Whether the Government should be allowed to withhold the name of an informer when the evidence disclosed that he was probably a participant in the offense charged and his identity would be helpful to the petitioners in their defense at the trial?

STATEMENT OF CASE

This action was commenced by filing a Bill of Indictment on April 10, 1970, TR. P.P. 3A-8A, Appendix 2A, which charged the petitioners, along with Jackson Parks Henderson, Jerry Wayne Shew and William Lawson Souther with the violation of Title 18 U.S.C. 371 in that these petitioners on or about August 5, 1969 to and including on or about October 30, 1969 did conspire together along with Brown Costello Ramey and Carolyn Ray Ross, not named as petitioners, to defraud the United States by manufacturing, distilling, possessing, transporting, removing, depositing and concealing distilled spirits on which a tax had not been paid with the intent to defraud the United States of said tax and to commit certain offenses against the laws of the United States pertaining to the illicit, unlawful and fraudulent manufacture, possession, transportation and distribution of distilled spirits to wit: 26 U.S.C. 5601(a)(1), 26 U.S.C. 7206(4), 26 U.S.C. 5601(a)(4).

The Bill of Indictment specifically and particularly stated that in the plan and purpose of the conspiracy the petitioners and co-conspirators did violate the aforesaid statutes in the Middle District of North Carolina on or about the dates as follows:

"(a) That they did unlawfully, knowingly, and wilfully have in possession and custody and under control an unregistered still and distilling apparatuses on or about October 29, 1969, in Yadkin County, in the Middle District of North Carolina.

(b) That they did at the unregistered distillery described in the preceding paragraph of this Indictment unlawfully, wilfully, and knowingly engage in and carry on the busines of a distiller without having given bond as required by law.

(c) That they did unlawfully, knowingly, and wilfully possess, transport, remove and conceal nontaxpaid distilled spirits produced at the unregistered distillery referred to in the immediately preceding two paragraphs of this Indictment, the exact dates and amounts being unknown to the Grand Jury."

All of the petitioners made motions for judgment of acquittal at the close of the Government's evidence and at the close of all the evidence and all of the motions were denied as to both cases except the motion of the petitioner Henderson which was allowed. The court preserved a ruling on the motion for judgment of acquittal by the petitioner Shew in the assault case numbered 108-WS-70. TR. 905-915, 953.

The attorney for the petitioner Ross and the attorney for the petitioners Ashley and Johnson argued to the jury that the charge in the Bill of Indictment required that the Government prove to the jury beyond reasonable doubt that the petitioners conspired concerning the second still which was seized on October 29, 1969 in Yadkin County. TR. 965-966, TR. 985-987.

The United States Attorney argued to the jury that the Government was not confined in the case by the Bill of Indictment to proving conspiracy as to the one distillery which was seized on October 29, 1969 and that the petitioners'attorneys were in error in their contention. TR. 1006.

The judge charged: "however, when a conspiracy is charged, proof showing only different and disconnected smaller conspiracies will not sustain a conviction, and proof of the crime committed by one or more of the defendants wholly apart from and without relation to others conspiring to do the thing forbidden will not sustain a conviction." TR. 1050-1051.

At the conclusion of the court's instruction to the jury all of the petitioners requested orally and in writing that the court instruct the jury that the conspiracy charged in the Bill of Indictment and the one to be considered by the jury is the one spelled out in the Bill of Indictment as follows:

"(a) That they did unlawfully, knowingly, and wilfully have in possession and custody and under control an unregistered still and distilling apparatuses on or about October 29, 1969, in Yadkin County, in the Middle District of North Carolina.

(b) That they did at the unregistered distillery described in the preceding paragraph of this Indictment unlawfully, wilfully, and knowingly engage in and carry on the business of a distiller without having given bond as required by law.

(c) That they did unlawfully, knowingly, and wilfully possess, transport, remove and conceal nontaxpaid distilled spirits produced at the unregistered distillery referred to in the immediately preceding two paragraphs of this Indictment, the exact dates and amounts being unknown to the Grand Jury." TR. 1070-1082.

The request and objection of the petitioners to the charge, as heretofore set forth, was denied, TR. 1082, and the reporter was instructed by the court to type it up and file the request and objection of the petitioners to the charge. TR. 1081-1082.

The court sustained objections of the Government to questions to the agent Carter concerning an informer whose identity the petitioner Ross contended was necessary for his defense. TR. 856-894.

The Bill of Indictment included 11 overt acts commencing August 15, 1969 and ending August 20, 1969. Appendix 3A.

On May 4, 1970, all of the petitioners were arraigned and pled not guilty. TR. 2A-16A.

Over the objection of all petitioners, another case numbered CR - 108-WS-70 charging that the defendant Jerry Wayne Shew on or about October 29, 1969 wilfully and by means and use of his fists, did forceably assault, resist, oppose, impede, intimidate and interfere with Haywood L. Weddle, an Investigator of Alcohol, Tobacco and Firearms Tax, Internal Revenue Service, United States Treasury Department, knowing him to be such officer, while the said Haywood L. Weddle was engaged in the performance of his official duties in violation of 18 U.S.C. 111, 1114. TR. 4-12. 14A-15A, was consolidated for trial.

The defendant Shew pled not guilty to the assault. TR. 14A-16A.

The court allowed the evidence of the assault over the strenuous objection of all of the petitioners, except the defendant Shew, without properly instructing the jury that this evidence should only be considered as against the defendant Shew on the assault charge but instead instructed the jury generally on how to consider the facts and statements of other conspirators. TR. 212-213.

The jury retired at 7:47 P.M. and returned with the verdict at 10:32 P.M. finding all of the petitioners guilty of the conspiracy charge and the defendant Shew not guilty of the assault charge in Criminal 108-WS-70, TR. 1084-1085.

Over the objection of all of the petitioners, the Government introduced exhibits 10 through 16 which were records of telephone calls contended by the petitioners to be irrelevant, immaterial and incompetent. TR. 776-781.

The petitioner Ashley received a sentence of imprisonment of 40 months in the custody of the Attorney General of the United States or his authorized representative and the petitioner Johnson received a sentence of 36 months in the custody of the Attorney General of the United States or his authorized representative and from the judgment and sentences imposed the petitioners Johnson and Ashley in apt time gave notice of appeal to the Fourth Circuit Court of Appeals.

The petitioner Ross received a sentence of 40 months in the custody of the Attorney General of the United States or his authorized representative and from the judgment and sentence imposed the petitioner Ross in apt time gave notice of appeal to the Fourth Circuit Court of Appeals.

On April 16, 1963, the petitioner Millard Franklin Ashley in case CR-35-S-63, Salisbury Division of the United States District Court for the Middle District of North Carolina received a 20-month sentence on Counts 1 and 2 of the Bill of Indictment. On Counts 3 and 4 of the Bill of Indictment, the petitioner Ashley was given a five-year sentence to begin at the expiration of the sentence of Counts 1 and 2 and the sentence was suspended and he was placed on probation for a period of five years to commence at the expiration of the sentence in Counts 1 and 2. TR. 1099-1100.

There was a special condition in the probationary sentence that the petitioner Millard Ashley not manufacture, buy, sell, transport, possess, or deal in alcoholic beverages in any of its forms and not knowingly associate with those who do. TR. 1100.

The petitioner Ashley was received on probation on December 21, 1964 to start this probation sentence. TR. 1100.

On April 16, 1970, a notice was mailed to the petitioner Millard Franklin Ashley by the probation officer with a copy to United States Judge Eugene A. Gordon which set forth that the petitioner is married, has five children and has a home located in the Windy Gap section. That he worked as a salesman, a used car salesman, and had gone back to work as a used car salesman, and he had been in business at Windy Gap with his brother-in-law, Lonnie Ellis Johnson, and that he made friends easily and was considered a good car trader. TR. 1103-1104.

The notice set forth in the last paragraph thereof that on October 29, 1969, Ashley was arrested along with Lonnie Ellis Johnson, Parks Henderson, Jerry Wayne Shew and William Souther, and charged with possession and operation of a large illicit distillery located in the Shiloh section of Yadkin County, North Carolina and that this distillery is the same distillery that was the subject matter of the conspiracy violation from which the petitioner Ashley was convicted in case number CR-123-WS-70 of the Middle District of North Carolina. TR. 1104.

It is further stated that as a result of the petitioner Ashley's arrest and being charged with the before mentioned offense (conspiracy) a probation violators warrant was issued on December 1, 1969. TR. 1104-1105.

The probation officer stated that the violation of the offense on October 29, 1969 was the only violation of which he had given the petitioner Ashley notice of. TR. 1105.

After the conviction of the petitioner Ashley on the conspiracy charge CR-123-WS-70, Judge Gordon immediately revoked the probation of the petitioner Ashley. The sentence heretofore imposed on April 16, 1963 of five years was reduced to 36 months and the petitioner was to be confined to the custody of the Attorney General of the United States or his authorized representative for a period of 36 months and this sentence to run concurrently with the sentence imposed that day in the conspiracy trial CR-123-WS-70. TR. 1142-1143.

From the sentence imposed the petitioner Ashley duly gave notice of appeal to the Court of Appeals of the Fourth Circuit.

The transcript of the record of the revocation of the sentence of the petitioner Millard Ashley was combined with the transcript of the record in the conspiracy case CR-123-WS-70 which is now number 71-1372 as now filed in the United States Court of Appeals for the Fourth Circuit.

The Government conceded in its brief on appeal filed with the United States Court of Appeals for the Fourth Circuit that "In the event the conspiracy conviction of the defendant Ashley is upheld, then the revocation of his probation should be sustained. In the event his conviction is reversed, then the probation should also be reversed."

All of the appeals of the petitioners were consolidated for purpose of Briefs, Appendix and Hearing by the Court and one opinion was entered by the United States Court of Appeals for the Fourth Circuit affirming the judgments of the District Court as to all of the petitioners. Appendix 1A.

RELEVANT FACTS

Over the objection of the petitioners the Government introduced evidence concerning the details of a dismantled still site located on the west side of Windsor Road across from the old Parks Henderson home place and about a mile and a quarter from the still site described in the Bill of Indictment as being the still which was the subject matter of the conspiracy and located across from the Estelle and Mozell Henderson home place on county road 1117. TR. 154, 159, 168.

The old dismantled distillery opposite the old Parks Henderson house on Windsor Road was discovered by the officers on October 6, 1969 and appeared to have been at that location for about three months. TR. 247.

The distillery described in the Bill of Indictment as the only still involved in the conspiracy was located by officers on October 21, 1969. TR. 167.

The still described in the Bill of Indictment as the only still involved in the conspiracy is located as shown by Government exhibit 18 on the south side of highway 1117 and on the opposite side of the road from the Estelle and Mozell Henderson home place and was reached by a road which went to a tobacco barn and crossed an open field and then crossed a power line and then entered into the still which was in a wooded section. Besides the woods which concealed the distillery, the distillery was concealed from view by the crest of a hill running along the power lines. You could not see the distillery from the house or from the barn. TR. 230, 238-241.

The road leading to the distillery from highway 1117 passed a tobacco barn before it turned in the direction of the distillery. TR. 230. The distillery could not be seen from highway 1117. The still site could not be seen from the road. TR. 185.

The only connection between the distillery operation off highway 1117 and described as the only distillery operation involved in the conspiracy by the Bill of Indictment and the old distillery at the Parks Henderson home place off Windsor Road was that in each distillery the barrels had the same type of rubber bands, TR. 173-174, and that one of the barrels at the highway 1117 location had soil on the bottom which was identified by a witness as being the same soil as found at the old Parks Henderson still site not alleged in the Bill of Indictment as a part of the conspiracy. TR. 756.

The distillery described in the Bill of Indictment as the only distillery involved in the alleged conspiracy and located to the south of highway 1117 had only been in existence about a month prior to October 29, 1969. TR. 248.

The still alleged in the Bill of Indictment to be the only still involved in the conspiracy was raided on October 29, 1969. TR. 205. The defendants Souther and Jerry Wayne Shew were arrested as they got out of a truck at the still yard. TR. 206. After the arrest of Jerry Wayne Shew, there was a struggle between Shew and the arresting officer. TR. 214.

On August 8, 1969, a 1966 Ford pickup truck, bearing North Carolina license number 4428-TV, 1969, was parked at the Pines

Restaurant. A 1969 Pontiac, bearing North Carolina license number EL-8526, 1969, was parked in the rear of the Ross residence. A 1966 Oldsmobile,bearing North Carolina license number VJ-4819, was parked in the rear of the Ross residence.

The petitioner Millard Ashley on August 5, 1969, almost two months before the distillery which was the object of the conspiracy as alleged in the Bill of Indictment, was seen talking over a pay telephone at Hall's Truck Stop on U. S. Highway 421 and after he finished talking on the pay phone, a 1966 white Ford pickup truck, bearing 1969 North Carolina license number 4428-TV drove up and the driver conversed with Ashley. The petitioner Ashley and the driver of the truck left on U. S. Highway 421 heading west. There was no evidence of liquor on the truck and no evidence that the truck was hauling anything. TR. 820-822.

On August 15, 1969, the petitioner Ashley was present when a sum of money was counted by the petitioner Ross at the Johnson Salvage Company and the petitioner Lonnie Ellis Johnson was present. No activity related to liquor or any activity relating to any violation of law whatsoever was observed on that day. The day of this transaction was approximately six weeks prior to the distillery which was alleged in the Bill of Indictment to be the object of the conspiracy. TR. 416-420.

On August 25, 1969, at 2:30 P.M., a 1955 red Chevrolet Truck, bearing North Carolina license number 2362-TJ, 1969, was parked behind the Pines Restaurant in Franklinton. At 10:00 P.M., the same red truck was on a dead end road three miles from the Pines Restaurant. It was loaded with 20 180-gallon Olive type barrels. TR. 389, 390-392. At 11:00 P.M., a 1969 Pontiac, bearing North Carolina license number EL-8326, 1969, came to the truck. Two men were in the car. TR. 393. At 11:20 P.M., the truck pulled out following the 1969 Pontiac. TR. 666.

On August 26, 1969, a 1955 red truck was found at a service station near the Yadkin-Wilkes county line. The same type 180-gallon Olive barrels were on the truck. TR. 421.

On August 27, 1969, at 9:30 P.M., a 1966 Oldsmobile, bearing North Carolina license number YJ-4819, 1969, was pulled from behind the Pines Restaurant to the front and gassed up. The petitioner Ross got in his 1969 Pontiac and followed behind the Oldsmobile when it left. Ross returned about six hours later at 3:30 A.M. TR. 787-788.

On September 19, 1969, at 2:00 A.M., petitioner Ashley arrived at Johnson's Salvage and made several telephone calls. At 2:15 A.M., the Ross Pontiac arrived at Johnson's Salvage. The driver and Ashley went inside and made several telephone calls and then left. At 3:30 A.M., Johnson's Chevrolet truck arrived at Johnson's Salvage with two more cars. Coke and sugar

were loaded on the truck and a second truck was loaded with heavy metallic objects. Both trucks then left. Ashley soon returned and talked to a man at Johnson's Salvage and then both left. TR. 538-543.

The petitioners Ashley and Johnson were also seen again at Johnson's Salvage Company on September 19, 1969 and again no persons there were seen to have possessed any material that went to a distillery and no vehicle that came at the time was shown to have gone from Johnson's Salvage Company to a distillery and the petitioner Ashley and the petitioner Johnson were not shown to have entered into any illegal activity whatsoever. TR. 536-543.

Over the objection of all of the petitioners, the Government introduced exhibits 10 through 16 to show telephone calls from Brooks Cross Roads, the Johnson's Salvage Company, the home of the petitioner Ashley and the Shew house to the telephone listed in the name of the petitioner Ross' wife and another telephone listed in the name of Costello Ramey and a pay telephone in front of the Pines Truck Stop. The Ross telephone, the Costello Ramey telephone and the pay telephone in front of the Pines Truck Stop were in Franklinton, North Carolina. No particular persons were shown to have made the telephone calls and they went back to July 1, 1969. TR. 82-133, TR. 642-645.

Officers Brawley, Stokes and Carter testified that they saw an unidentified driver driving a 1966 white Oldsmobile at and around the Pines Truck Stop. TR. 590-595; 789-795; 825-826.

Officer Brawley admitted on cross examination that he saw the unknown driver of a 1966 white Oldsmobile probably ten times, and maybe fifteen, and he thought that he knew who he was. He thinks that his name is either Gerald or Jerry. That it was either Taylor or Tyler. TR. 607. That in spite of all the money that the Government has spent investigating this case, that he never did attempt to identify the driver of this car or where he lived. TR. 608.

Officer Stokes when questioned on cross examination admitted that he saw several drivers drive the 1966 Oldsmobile and that Russell Taylor was one of the men who was driving the 1966 Oldsmobile. That he found out who Russell Taylor was after he had prepared his report. That he had seen him driving it on numerous occasions and that he had reported it to other officers. That when he had determined it he reported it. TR. 809-811.

Officer Carter admitted that he had been knowing Russell Taylor for approximately eight years and that during the investigation he dealt with him. But he did not recall on how many occasions. That he had talked with him for years. That he talked to him prior to August 5, 1969. That he dealt with him during the investigation he does not recall how many occasions. That he talked with him periodically for years. TR. 856-857.

REASONS FOR GRANTING WRIT

The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

1. The decision against the petitioners allowed the Government to unfairly surprise the petitioners with evidence pertaining to another distillery, which was not in existence after October 6, 1969, inspite of the specific allegation in the Bill of Indictment that the object of the conspiracy was the distillery in operation on October 29, 1969.

This manuever on the part of the Government is a flagrant violation of the Fifth Amendment of the Constitution of the United States which requires that prosecution for a felony be begun by Indictment and forbids an amendment to the Bill of Indictment charging a felony.

The Government alleged the offense of conspiracy in general terms and could have rested upon its general allegations.

Had the Government elected to rely upon the general terms of the Bill of Indictment, it would have been incumbent upon the petitioners to ask for a Bill of Particulars if a more particular statement was desired.

In the Bill of Indictment here, the Government specifically limited itself to a distillery in operation on October 29, 1969 by the following language:

> "That is to say, it was the plan and purpose of said conspiracy that the said defendants and co-conspirators would and did violate the aforesaid statutes in the Middle District of North Carolina on or about the dates as follows:
>
> (a) That they did unlawfully, knowingly, and wilfully have in possession and custody and under control an unregistered still and distilling apparatuses on or about October 29, 1969,in Yadkin County, in the Middle District of North Carolina.
>
> (b) That they did at the unregistered distillery described in the preceding paragraph of this indictment unlawfully, wilfully, and knowingly engage in and carry on the business of a distillery without having given bond as required by law.
>
> (c) That they did unlawfully, knowingly, and wilfully possess, transport, remove and conceal nontaxpaid distilled spirits produced at the unregistered distillery referred to in the

> immediately preceding two paragraphs of this indictment, the exact dates and amounts being unknown to the Grand Jury." Appendix 3A.

The foregoing language without question limited the Government to the distillery in existence on October 29, 1969 as "the plan and purpose of said conspiracy" and thus specifically alleged the object of the conspiracy to be the distillery raided on October 29, 1969.

The allegation that the object of the conspiracy was an unregistered still and distilling apparatuses on or about October 29, 1969, was not alleged as an overt act of the conspiracy. The overt acts are set forth as eleven in number at the end of the Bill of Indictment. Appendix 3A-4A.

The distillery alleged in the Bill of Indictment to be the object of the conspiracy was raided on October 29, 1969. TR. 205-206.

The Government, over the petitioners' objection, was allowed to introduce evidence of a dismantled distillery which was at another location and which was not in operation after October 6, 1969. TR. 155-163.

The distillery raided on October 29, 1969 had only been in existence about 30 days. TR. 248.

The old distillery, dismantled on October 6, 1969, had been in existence for about three months prior to October 6, 1969. TR. 247.

The only connection between the old distillery and the distillery alleged in the Bill of Indictment was that at both distilleries there were the same type 180-gallon Olive barrels. TR. 159, 169. Also, one of the barrels, at the distillery in existence on October 29, 1969, had soil on it identified by highly questionable evidence as having come from the distillery site not alleged in the Bill of Indictment. TR. 756-757.

The fact that two separate distillery sites have some similar equipment and one barrel had been at both distillery sites, does not show that the distilleries are one and the same.

The more reasonable inference from this evidence is that the operators of the distillery, alleged in the Bill of Indictment, procured a barrel and possibly some barrels that had been at the old distillery. This would indicate two separate conspiracies.

In the conspiracy concerning the old dismantled distillery, the operators are totally unknown. In the distillery in operation on October 29, 1969, referred to in the Bill of

Indictment, some of the operators are known, but are not shown to have any connection with the old distillery off the Windsor Road, dismantled as of October 6, 1969.

In allowing this evidence over the objection of the petitioners, the Court in effect allowed an amendment to the Bill of Indictment in direct disregard of the decision of this Court in Stirone v. United States, 361 U.S. 212 (1959). In that case, Stirone was charged with extortion in connection with the obstruction and prevention of a contract to supply ready-mixed concrete. The district judge permitted the Government to offer evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other states but also in steel shipment from the steel plant in Pennsylvania into Michigan and Kentucky. The Court in reversing the conviction of the defendant said:

> "It follows that when only one particular kind of commerce is charged to have been burdened the conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms the conviction might rest on a showing that commerce of one kind or another had been burdened. The right to have the grand jury take the charge on its own judgment is a substantial right which cannot be taken away with or without court amendments."

The Court further said in Stirone v. United States, supra:

> "The crime charged is a felony and the Fifth Amendment requires a prosecution be begun by indictme nt."

In Stirone v. United States, the Court further said:

> "That the error cannot be dismissed as merely an insignificant variance between allegation and proof and thus a harmless error."

The Court was not only in error in its charge, but on the admission of evidence in Stirone v. United States, supra, for the Court stated:

> "Yet because of the Court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted the petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error."

This violation of the petitioners' constitutional rights to be charged with a felony by a Bill of Indictment, not only unfairly, surprised and handicapped the petitioners, but the Government was enabled by the illegal amendment to greatly broaden

its prosecution and bring into evidence acts of the petitioners which had no reasonable relationship to the distillery in existence on October 29, 1969 and, if related to any distillery, could have been related only to the distillery that was dismantled on October 6, 1969 and was in existence for about three months prior thereto.

The admission of the evidence concerning the old distillery allowed the Government to show acts on August 5, TR. 820-822, August 8, TR. 282, August 15, TR. 416-420, August 25, TR. 389, 390-392, 666, August 26, TR. 421, August 27, TR. 787-788 and September 19, TR. 536-543 which could have no relationship whatsoever to any distillery other than the old distillery not shown as the object of the conspiracy.

The allowance of this amendment to the Bill of Indictment, in violation of the petitioners' constitutional rights, also gave meaning to telephone calls as far back as July 1, 1969. TR. 82-133, TR. 642-645.

The trial court added to the violation of the petitioners' constitutional right to be tried upon a Bill of Indictment by refusing to allow the petitioners' request that the jury be instructed that the conspiracy charged in the Bill of Indictment and the one to be considered by the jury is the one spelled out in the Bill of Indictment as follows:

> "(a) That they did unlawfully, knowingly, and wilfully have in possession and custody and under control an unregistered still and distilling apparatuses on or about October 29, 1969, in Yadkin County, in the Middle District of North Carolina.
>
> (b) That they did, at the unregistered distillery described in the preceding paragraph of this indictment, unlawfully, wilfully and knowingly engage in and carry on the business of a distiller without having given bond as required by law.
>
> (c) That they did unlawfully, knowingly, and wilfully possess, transport, remove and conceal nontaxpaid distilled spirits produced at the unregistered distillery referred to in the immediately preceding two paragraphs of this indictment, the exact dates and amounts being unknown to the Grand Jury." TR. 1069-1082.

The requirement of the Fifth Amendment to the Constitution of the United States that requires that all felonies be prosecuted by the Bill of Indictment is an important safeguard not only for these petitioners, but for every citizen of the United States of America. No citizen of this land of ours should be prosecuted for

any crime not alleged in the Bill of Indictment and these petitioners and no citizen of the United States of America should be convicted upon a Bill of Indictment amended, as was this one, by evidence of the old distillery which was not shown to be connected with a single person alleged to be a conspirator or co-conspirator.

The conviction of these petitioners is not only contrary to Stirone v. United States, supra, but is contrary to all the principles of fair play which are part of the adversary system of this great nation.

2. The decision of the Fourth Circuit Court of Appeals is also in conflict with Roviaro v. United States, 353 U.S. 53 (1957) which required disclosure of the identity of an informer where enforcement of a non-disclosure policy deprives the accused of a fair trial.

Here the failure of the District Court to follow the decision of this court deprived the petitioner Ross and the other petitioners of their only chance to show that actions described by the officers were not what the officers depicted them to be.

The petitioners respectfully submit that a sufficient showing was made in the trial of this action in the District Court to disclose to the Court that the informer was probably the person described by the officer as an unknown driver of the 1966 Oldsmobile and the 1966 Ford pickup truck on August 5 at Hall's Truck Stop.

The officers were evasive to a fantastic degree.

Officers Brawley, Stokes and Carter testified that they saw an unidentified driver driving a 1966 white Oldsmobile at and around the Pines Truck Stop. TR. 590-595; 789-795; 825-826.

Officer Brawley admitted on cross examination that he saw the unknown driver of a 1966 white Oldsmobile probably ten times, and maybe fifteen, and he thought that he knew who he was. He thinks that his name is either Gerald or Jerry. That it was either Taylor or Tyler. TR. 607. That inspite of all the money that the Government has spent investigating this case, that he never did attempt to identify the driver of this car or where he lived. TR. 608.

Officer Stokes when questioned on cross examination admitted that he saw several drivers drive the 1966 white Oldsmobile and that Russell Taylor was one of the men who was driving the 1966 Oldsmobile. That he found out who Russell Taylor was after he had prepared his report. That he had seen him driving it on numerous occasions and that he had reported it to other officers. That when he had determined it he reported it. TR. 809-811.

Officer Carter admitted that he had been knowing Russell Taylor for approximately eight years and that during the investi gation he dealt with him. But he did not recall on how many occasions. That he had talked with him for years. That he talked to him prior to August 5, 1969. That he dealt with him during the investigation he does not recall how many occasions. That he talked with him periodically for years. TR. 856-857.

During the cross examination of Agent Carter, who was in charge of the investigation, the following questions were asked and objected to by the Government and the objections sustained by the Court:

Q And as a result of information he gave you, you drove from Raleigh up to Hall's Truck Stop at 2:00 or 3:00 o'clock in the morning, didn't you?

Mr. Osteen: Object, Your Honor.

The Court: Sustained. TR. 858

Jury Excused.

Jury Returned.

Q Mr. Carter, did you talk with or communicate with the defendant Russell Taylor just prior to your going to the Hall's Truck Stop on the morning of August 5th, 1969?

Mr. Osteen: Object.

The Court: Sustained. TR. 863-864

Q In your talks with him, did he tell you where he lived?

Mr. Osteen: If this is during the conspiracy -- what time are you talking about?

Mr. Murdock: I am talking about during the conspiracy.

The Court: Are you objecting;

Mr. Osteen: Yes, sir, I'm objecting.

The Court: Sustained. TR. 871

Q In your discussions with him, did you ask where he lived?

Mr. Osteen: Objection.

The Court: Sustained.

Mr. Murdock: Your Honor --

The Court: I am sustaining the objection, Mr Murdock. TR. 872

Q Russell Taylor was an employee of yours, was he not?

Mr. Osteen: Object.

The Court: Sustained. TR. 878

Q Was Russell Taylor one of your paid informants?

Mr. Osteen: Objection.

The Court: Sustained. TR. 880

Jury Excused.

The Court: Now, Mr. Murdock, I want this perfectly clear now. . . . Now, I am not going to let you ask about who the informants are in this, even to put it on the record here. TR. 881

Q Did you have a paid informant? (Question by Mr. Murdock).

Mr. Murdock: You say you are not going to permit me to ask his name?

The Court: No.

Q Who was living there in the Pines Mobile Home Court?

Mr. Osteen: Object to where he was living.

The Court: Sustain that. TR. 883

Q He was living in Franklin County?

Mr. Osteen: Object, Your Honor.

The Court: Sustained. TR. 884

Q All right. When was the next time that he communicated with you after August the 5th?

Mr. Osteen: Object.

The Court: Have you said he communicated with you on August the 5th?

A (By the witness) I testified that I had information about the meeting between Mr. Ross's driver and Mr. Ashley, yes, sir.

Mr. Osteen: But as I understand it, you didn't say what day you received that information?

A No, sir, I did not.

The Court: Sustain it.

Q (By Mr. Murdock) What day did you receive it?

Mr. Osteen: Object.

Mr. Murdock: Your Honor sustained that objection?

The record will show that this is out of the presence of the jury.

The Court: Overruled.

A (By the witness) I don't recall. TR. 884-885

Q (By Mr. Murdock) What area was that?

Mr. Osteen: Object.

The Court: Sustained. TR. 889

The Court: You want to know what area the informer frequented?

Mr. Murdock: Yes, sir.

The Court: I sustain the objection. Anything further?

Mr. Murdock: Your Honor sustained the objection?

The Court: I sustained the objection as to what area he frequented. TR. 890

Q Where did you meet him?

Mr. Osteen: Object.

The Court: I sustain that. TR. 891

Q What about your paid informant? Is he slim and medium height?

Mr. Osteen: Object.

The Court: Sustained. TR. 894

Q It was your informant, wasn't it?

Mr. Osteen: Object.

The Court: Sustained. TR. 898

Agent Carter checked the license and registration on the 1966 white Ford pickup and the 1966 white Oldsmobile, Nos. 3 and 9 on the Government chart, and found that one was registered to a Ernest Lee Meshaw in Fayetteville, and the other to a Roy Hargrove. TR. 898.

It should be noted that Officer Stokes was shown on cross examination to be actually covering up the identity of the driver of the 1966 Oldsmobile who on cross examination he later admitted to be Russell Taylor. The petitioner Ross was prevented by the Court from questioning Agent Carter, who was in charge of the investigation, as to whether Russell Taylor was a paid informant or even if he had communicated with him just prior to going to Hall's Truck Stop. TR. 863-864, 878, 880.

The Government contended that it connected the petitioner Ross to the conspiracy through the two vehicles, the 1966 Ford pickup truck and the 1966 white Oldsmobile, and their driver. It was most essential to the fair trial of the petitioner Ross to know whether or not this unidentified driver was a paid employee of the Government, or an informer.

It would appear from all of the evidence that the unidentified driver purposely remained unidentified in order to deprive the petitioner Ross of a fair trial. Some 13 officers testified for the Government as having seen the petitioner Ross and various vehicles at several times, and not one testified on direct examination as to the identity of the driver other than an unidentified or unknown white male, with the exception of one or two occasions when a man by the name of Thomas Dickerson was seen driving these vehicles in Franklin County, 150 miles from the still. The admission by Agent Stokes that he saw Russell Taylor driving the 1966 Oldsmobile was forced out of him on cross examination after he had attempted to conceal the information on direct examination.

If the Court had required the Government to dismiss or disclose the name of the informer and it had appeared that the informer was a man by the name of Russell Taylor, then the petitioner Ross could have shown, and the jury considered, certain facts relating to Russell Taylor and his activities which were material and relevant to Ross's defense. That Russell Taylor occupied a trailer in the Pines Mobile Home Court which was in the vicinity of the petitioner Ross's home and place of business. That Russell Taylor had in his possession and operated a 1966 white Oldsmobile and a 1966 white Ford pickup truck, described in this case. That these two vehicles were registered in the names of Russell Taylor's father-in-law and brother-in-law. That the vehicles were not in any way owned or controlled by the petitioner Ross. That on August 15, 1969, the petitioner Ross visited the Johnson's Salvage Company and that Russell Taylor was the operator of the Pontiac automobile in which they were riding. That Taylor had requested Ross to go by the Johnson's Salvage Company on this occasion. That they were with their families on the way to the mountains for a weekend. That Taylor made telephone calls to the Johnson's Salvage Company from Franklin County and received calls from the Johnson's Salvage Company telephone while in Franklin County.

It is contended that the connecting links by which the Government sought to fasten Ross to the conspiracy were the meeting on August 5,1969, at Hall's Truck Stop of the unidentified driver and petitioner Ashley; the occasion on August 15 when Ross, with the unidentified driver, visited Johnson's Salvage Company and conferred with the petitioners Ashley and Johnson; and the presence in Franklin County of the 1966 white Ford pickup truck and the 1966 white Oldsmobile, which truck and automobile were later seen operated by the unidentified driver in the vicinity of the still. With the exception of the petitioners, there is no one that could controvert, explain or amplify the Government's testimony as to these incidents other than the unidentified, white, male driver. Therefore, it was most material and relevant to the petitioner Ross's defense to learn the identity of the unidentified, white, male driver.

Throughout this trial, the Government's witnesses were evasive, gave conclusions as facts, and attempted to withhold evidence which might have been helpful to the petitioners, seeking to leave the impression with the jury that the unidentified driver was not the informer, realizing that if the informer was a participant in the commission of the crime the petitioners would be entitled to learn his identity and the Government would not be privileged to withhold this information. On the other hand, if the unidentified driver was not the informer, and the informer did not participate in the commission of the crime, it is doubtful that under the circumstances of this case the petitioners would be entitled to the disclosure of the identity of the informer. Agent Carter testified that the informer was not, to his knowledge, hauling liquor, TR. 891, which would indicate to the jury that the unidentified driver was not the informer, which the petitioner Ross contends was misleading and prejudicial to his defense if the unidentified driver was the informer.

The failure of the Court to require the Government to dismiss or disclose the identity of the informer, or the participation, if any, of the informer in the commission of the offense deprived the defendants of a fair trial, and the judgment of the Court should be reversed and the case remanded.

The refusal of the Court to allow disclosure of the identity of the informer was particularly prejudicial to the petitioner Ross, however, the petitioners Ashley and Johnson would have also been benefitted by the revelation of the true innocence of the visit to Johnson's Salvage Company by the petitioner Ross and his family on August 15, 1969 when the petitioner Ross and his family visited the mountains on that date.

It is clear that this case cries out in a loud voice for a new trial in which the revelation of the identity of the informer shall be required in order to allow the accused a fair trial as required by Roviaro v. United States, supra. The denial of the

petitioners' of the right of this disclosure enveloped the trial with a cloud of suspicion which should be erased not only to give the petitioners a fair trial but for the protection of all of our citizens against over-zealous actions on the part of officers to effect a successful prosecution without any regard for the rights of our citizens to a fair trial.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgments of the Court of Appeals for the Fourth Circuit should issue.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1371

UNITED STATES OF AMERICA,

Appellee,

versus

DOUGLAS FREEMAN ROSS,

Appellant.

No. 71-1372

UNITED STATES OF AMERICA,

Appellee,

versus

MILLARD FRANKLIN ASHLEY and
LONNIE ELLIS JOHNSON,

Appellants.

No. 71-1373

UNITED STATES OF AMERICA,

Appellee,

versus

MILLARD FRANKLIN ASHLEY,

Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro.
Eugene A. Gordon, District Judge.

(Argued October 4, 1971. Decided October 14, 1971.)

Before Haynsworth, Chief Judge, Craven, Circuit Judge, and Dupree, District Judge.

William H. Murdock, for Appellant in No. 71-1371; Irvin B. Tucker, Jr., for Appellant in Nos. 71-1372 and 71-1373; William L. Osteen, United States Attorney (Bradley J. Cameron, Assistant United States Attorney, on brief) for Appellee in Nos. 71-1371, 71-1372 and 71-1373.

PER CURIAM:

After full consideration of the briefs and oral argument of counsel, we find no reversible error.

AFFIRMED.

APPENDIX B

BILL OF INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That beginning on or about August 5, 1969, to and including on or about October 30, 1969, in the Middle District of North Carolina, and within the jurisdiction of this Court, and at other places to the Grand Jurors unknown, MILLARD FRANKLIN ASHLEY, JACKSON PARKS HENDERSON, LONNIE ELLIS JOHNSON, DOUGLAS FREEMAN ROSS, JERRY WAYNE SHEW and WILLIAM LAWSON SOUTHER, who are designated herein as defendants, did unlawfully, wilfully, knowingly, feloniously and fraudulently combine, conspire, confederate, agree, and have a tacit understanding with each other and with Brown Costello Ramey and Carolyn Ray Ross, not herein named as defendants but named as co-conspirators, and various other persons to the Grand Jurors unknown, in violation of Section 371 of Title 18 U.S.C., to defraud the United States by manufacturing, distilling, possessing, transporting, removing, depositing and concealing distilled spirits on which a tax had not been paid with the intent to defraud the United States of said tax and to commit certain offenses against the laws of the United States pertaining to the illicit, unlawful and fraudulent manufacture, possession, transportation and distribution of distilled spirits, to wit:

(a) To unlawfully, wilfully, and knowingly have in possession and custody and under control certain stills and distilling apparatuses used and intended to be used for the distillation of distilled spirits set up without having same registered as required by law, in violation of Section 5601 (a)(1), Title 26 U.S.C.

(b) To unlawfully, wilfully, and knowingly remove, deposit, and conceal a certain commodity for and in respect whereof a tax was imposed by the laws of the United States of America and which tax had not been paid, to wit: certain quantities of distilled spirits, the exact quantities being to the Grand Jurors unknown, with the intention to evade collection by the United States of America, of the tax imposed on such spirits, in violation of Section 7206(4), Title 26 U.S.C.

(c) To unlawfully, wilfully, and knowingly engage in and carry on the business of distillers of spirituous liquors without having given bond as required by law, in violation of Section 5601(a)(4), Title 26 U.S.C.

That is to say, it was the plan and purpose of said conspiracy that the said defendants and co-conspirators would and did violate the aforesaid statutes in the Middle District of North Carolina on or about the dates as follows:

(a) That they did unlawfully, knowingly, and wilfully have in possession and custody and under control an unregistered still and distilling apparatuses on or about October 29, 1969, in Yadkin County, in the Middle District of North Carolina.

(b) That they did at the unregistered distillery described in the preceding paragraph of this indictment unlawfully, wilfully, and knowingly engage in and carry on the business of a distillery without having given bond as required by law.

(c) That they did unlawfully, knowingly, and wilfully possess, transport, remove and conceal nontaxpaid distilled spirits produced at the unregistered distillery referred to in the immediately preceding two paragraphs of this indictment, the exact dates and amounts being unknown to the Grand Jury.

And the Grand Jury further charges that having so conspired, combined, confederated and agreed, said defendants and co-conspirators in furtherance of said conspiracy and to effect the objects and purposes thereof, did commit numerous overt acts within the jurisdiction of this Court and among which overt acts are the following, on or about the dates alleged, to wit:

1. On August 15, 1969, in the Windy Gap Section of Wilkes County, North Carolina, DOUGLAS FREEMAN ROSS gave MILLARD FRANKLIN ASHLEY a large sum of money, the exact amount being unknown to the Grand Jury.

2. On September 19, 1969, in the Windy Gap Section of Wilkes County, North Carolina, MILLARD FRANKLIN ASHLEY and a person unknown to the Grand Jury possessed a large quantity of coke and sugar, the exact amount being unknown to the Grand Jury.

3. On October 21, 1969, in the Windy Gap Section of Wilkes County, North Carolina, MILLARD FRANKLIN ASHLEY and LONNIE ELLIS JOHNSON possessed two, more or less, coke burner boilers.

4. On October 22, 1969, in the Windy Gap Section of Wilkes County, North Carolina, MILLARD FRANKLIN ASHLEY and persons unknown to the Grand Jury possessed a large quantity of cardboard containers, the exact amount being unknown to the Grand Jury.

5. On October 24, 1969, LONNIE ELLIS JOHNSON transported three men unknown to the Grand Jury to an unregistered distillery located on the Lucille Henderson property in Yadkin County, North Carolina.

6. On October 25, 1969, LONNIE ELLIS JOHNSON and MILLARD FRANKLIN ASHLEY transported three men unknown to the Grand Jury to the unregistered distillery referred to in preceding overt act number 5 of this indictment.

7. On October 26, 1969, MILLARD FRANKLIN ASHLEY and three persons unknown to the Grand Jury removed a large quantity of nontaxpaid distilled spirits, the exact amount being unknown to the Grand Jury, from the unregistered distillery referred to in preceding overt acts number 5 and 6 of this indictment.

8. On October 28, 1969, LONNIE ELLIS JOHNSON transported JERRY WAYNE SHEW and WILLIAM LAWSON SOUTHER and a person unknown to the Grand Jury, from the unregistered distillery referred to in preceding overt acts number 5, 6 and 7 of this indictment.

9. On October 28, 1969, JACKSON PARKS HENDERSON and a young boy unknown to the Grand Jury, obliterated vehicular track marks from the workway leading to the unregistered distillery referred to in preceding overt acts number 5, 6, 7 and 8 of this indictment.

10. On October 29, 1969, JERRY WAYNE SHEW and WILLIAM LAWSON SOUTHER and a person unknown to the Grand Jury operated the unregistered distillery referred to in preceding overt acts number 5, 6, 7, 8 and 9 of this indictment.

11. On October 30, 1969, in the Windy Gap Section of Wilkes County, North Carolina, LONNIE ELLIS JOHNSON possessed 60, more or less, one-gallon plastic jugs; 30, more or less, 50-pound bags of malt; seven, more or less, two-pound cans of yeast; one, more or less, box of jug caps; one, more or less, Courier walkie-talkie radio; two, more or less, boxes for Courier walkie-talkie radios; and a large quantity of coke, the exact amount being unknown to the Grand Jury.

A TRUE BILL

BRIEF FOR RESPONDENTS IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-643

DOUGLAS FREEMAN ROSS, MILLARD FRANKLIN ASHLEY, AND LONNIE ELLIS JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1971. The petition for a writ of certiorari was filed on November 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a fatal variance in the government's proof regarding the conspiracy charged in the indictment.

453-044—71

2. Whether the court erred in refusing to compel the government to disclose the name of its confidential informer.

STATEMENT

After a jury trial with others in the United States District Court for the Middle District of North Carolina, petitioners were convicted of having conspired to operate an unregistered distillery without bond and to conceal non-taxpaid liquor (26 U.S.C. 5601(a)(1), (4) and 26 U.S.C. 7206(4)) in violation of 18 U.S.C. 371 (Pet. App. 2A–4A; Tr. 1084–1085).[1] On January 25, 1971, petitioners Ross and Ashley were each sentenced to imprisonment for forty months (Tr. 1142, 1145); petitioner Johnson was sentenced to thirty-six months' imprisonment (Tr. 1144). The court of appeals affirmed the convictions *per curiam* (Pet. App. A).

1. On October 6, 1969 (Tr. 155) government agents discovered a distillery site—which was in the process of being dismantled—in Yadkin County, North Carolina, west of Windsor Road near Highway 421 and the Parks Henderson home (Tr. 158–159). On October 21, 1969, a second distillery site was discovered in Yadkin County near County Road 1117 and the Estelle and Mozelle Henderson home, about a mile and a half from the first site (Tr. 167–168). At the second site there were about sixty 180-gallon olive barrel fermenters similar to those seen at the first site, non-taxpaid whiskey in jugs, and large quantities of

[1] "Tr." refers to the seven-volume transcript of the trial testimony, a copy of which we are lodging with the Clerk of this Court.

mash and coke (Tr. 173–174, 226). An agent estimated that this site had been in operation about one month before it was raided on October 29, 1969 (Tr. 248).

On various dates between August 5, 1969, and October 30, 1969—the period during which the conspiracy continued—the agents observed various automobiles and heavily laden trucks with barrels traveling on the highways between certain locations frequented by petitioners and the distillery sites. Usually petitioner Ross was driving a 1969 Pontiac, petitioner Ashley a 1968 Buick, and petitioner Johnson a 1969 Chevrolet pickup truck. On some occasions an unidentified man was driving a 1966 Oldsmobile (Tr. 170–172, 177–180, 187–190, 192–193, 195, 202–203, 276–284, 292–293, 295, 299–301, 303–305, 392–393, 396, 417–419, 483–487, 525–529, 539–542, 590–594, 611–614, 662–666, 670, 682–683, 822–828).

On August 15, 1969, at about 8:30 p.m., Ross was seen counting a large amount of currency on a counter at the Johnson Salvage Store in the presence of Ashley and Johnson (Tr. 417–420, 681–685). On October 23, 1969, Johnson and codefendants Shew and Souther were observed at the second still site where noises were heard. Later that night a 1966 Oldsmobile and a Pontiac drove to the site (Tr. 186–190).

In the raid on October 29, 1969, agents arrested Shew and Souther after they alighted from a truck at the second still site; a third man then drove the truck away (Tr. 205–206, 216, 732–733).[2] There were approximately seventy barrel fermenters at the sec-

[2] On the same day Ashley and Johnson were arrested (Tr. 720); Ross was arrested on April 16, 1970 (Tr. 813–814).

ond site which had a mash capacity of 9,590 gallons, and an almost equivalent number of barrel impressions in the yard at the first site (Tr. 819–820). There was no bond posted for a registered distillery at the second site, and no tax stamps for the liquor were found there (Tr. 226). Soil taken from a barrel at the second site was similar to that at the first site, and to soil removed from the wheel of one of the trucks observed during the surveillance (Tr. 745, 756–757).

On October 30, 1969, a search warrant was executed at the Johnson Salvage Store. Agents seized 3,840 jugs, thirty bags of malt, seventy two-pound cans of yeast, one box of jug caps, twenty bags of coke, and thirty-six bundles of cardboard boxes (Tr. 720–721).

At trial petitioners objected to the introduction of evidence concerning the discovery of the original still site (Tr. 155–158) and, after all evidence had been introduced, requested that the court give an instruction that the jury could consider only evidence relating to the "one conspiracy" involving the second (and not the first) distillery site. The court refused to give such an instruction (Tr. 1075–1082).

2. Government agents at various times during the trial referred to the operator of the 1966 Oldsmobile as an unidentified white male (Tr. 192–193, 301, 304, 483, 590, 789). One agent said he saw the Oldsmobile driven by one Taylor (Tr. 607), and another agent testified that one Dickerson was seen driving it (Tr. 788–789, 810). The Court sustained an objection to a question as to whether Russell Taylor was a paid informer and would not allow defense counsel to ask for the names of informers (Tr. 880–882).

ARGUMENT

1. Petitioners contend that there was a fatal variance when the government was permitted to introduce evidence relating to the first distillery site, discovered on October 6, 1969 (Pet. 10–14). While the indictment made specific reference to the second distillery site, the charging paragraph alleged a conspiracy from August 5 to October 30, 1969, for unlawful possession of "certain stills and distilling apparatuses" (Pet. App. 2A)—plural language covering the first, as well as the second site. Moreover, proof relating to the first, dismantled distillery site was not an amendment of the indictment, but evidence showing the nature of the conspiracy and overt acts in furtherance thereof. The indictment charged only a single conspiracy (see *Blumenthal* v. *United States,* 332 U.S. 539) to violate the liquor laws, and this was accomplished by moving the still site from one location to another. It is proper to introduce proof of an overt act not explicitly charged in the indictment. *Brulay* v. *United States,* 383 F. 2d 345, 350–351 (C.A. 9), certiorari denied, 389 U.S. 986; *Napolitano* v. *United States,* 340 F. 2d 313, 314 (C.A. 1).

2. There is no merit to petitioners' contention that the trial court erred in refusing to compel the government to disclose the name of its confidential informer (Pet. 14–20). See *McCray* v. *Illinois,* 386 U.S. 300, 309–311; *Rugendorf* v. *United States,* 376 U.S. 528, 534–536. *Roviaro* v. *United States,* 353 U.S. 53, is inapplicable since there the informer was the only other participant in the crime and "helped to set up the criminal occurrence" (353 U.S. at 64). His testimony

would have been crucial on the issue of entrapment. His production by the government was therefore essential to a fair trial. Here, on the other hand, no evidence was presented that the informer participated in the conspiracy. One agent testified that the informer never hauled any whiskey or participated in the making of whisky at the stills (Tr. 379).

The only information given to the government by the informer was (1) the meeting place of Ashley and an employee of Ross, driving a 1966 Ford truck, at Hall's Truck Stop on August 5, 1969 (Tr. 863–864), and (2) the location of the second distillery site. These were circumstances verified by the agents and did not involve the participation of the informer. Petitioners have not suggested how cross-examination of the informer would have been material to any defense.

Petitioners believe that Russell Taylor was the informer and suggest that certain facts about Taylor were relevant to their case (Pet. 18). But if those facts (*e.g.*, that Taylor possessed the 1966 Oldsmobile and Ford pickup described by the agents) have any significance to the defense, it is independent of whether Taylor was the informer, and the defense was free to adduce them if it chose.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1971.

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